

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

EDWARD ANTHONY CEJA,	)	Case No. SACV 11-0477-MLG
	)	
Petitioner,	)	
	)	MEMORANDUM OPINION AND ORDER
v.	)	
	)	
M.D. BITER, Warden,	)	
	)	
Respondent.	)	

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**I. Background**

**A. Procedural History**

Petitioner Edward Ceja was convicted by an Orange County Superior Court jury of possession of a firearm by a felon (Cal. Penal Code § 12021(a)(1)) and active participation in a criminal street gang (Cal. Penal Code § 186.22(a)). The jury also found true the allegation that Petitioner possessed the firearm for the benefit of a criminal street gang (Cal. Penal Code § 186.22(b)(1)). Petitioner admitted that he had suffered a prior "strike" conviction (Cal. Penal Code §§ 667(d),(e)(1), 1170.12(b),(c)(1)). Petitioner was sentenced

1 to prison for a term of twelve years.

2       Petitioner appealed his conviction to the California Court of  
3 Appeal, arguing that the evidence was insufficient to support the  
4 firearm charge and that he was denied a fair trial. (Lodgment 4.) On  
5 September 20, 2010, the court of appeal affirmed Petitioner's  
6 conviction in a written opinion. (Lodgment 7.) Petitioner filed a  
7 petition for review in the California Supreme Court, raising the same  
8 claims as in his earlier appeal. (Lodgment 8). The California Supreme  
9 Court summarily denied the petition. (Lodgment 9.) On March 28,  
10 2011, Petitioner filed this petition for writ of habeas corpus,  
11 raising identical grounds for relief.

12       **B. Facts**

13       The underlying facts are excerpted from the unpublished opinion  
14 of the California Court of Appeal. *People v. Edward Anthony Ceja*, No.  
15 G042106 (Cal.Ct.App., Sept. 20, 2010) (Lodgment 7).<sup>1</sup> In all quoted  
16 sections of this Report, the term "Petitioner" is substituted for  
17 "Defendant."

18               1. Events Leading up to November 22, 2008

19       Frankie Velasquez, a Folks gang member, lived in Folks  
20 gang territory on the corner of Neighbors Avenue and  
21 Mohican Way in Anaheim. Two weeks before the charged  
22 incident, members of Citron Street, a rival gang, drove  
23 through the Folks neighborhood while Velasquez was standing  
24 outside his house. The Citron Street members challenged  
25 Velasquez and fired two shots at him with a "bird shot

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26  
27       <sup>1</sup> Those sections of the court of appeal opinion which are not  
28 relevant to this habeas corpus petition have been omitted for purposes  
of brevity.

1       shotgun," blinding him.

2               On November 20, 2008, Anaheim Police Officer Brian  
3       Browne, who also testified as a gang expert, was on patrol  
4       with his partner in the Mohican Glenn neighborhood. His  
5       partner saw Velasquez with approximately five other "gang  
6       types" in the alley by the garage behind Velasquez's house.  
7       According to Browne, Petitioner stood out because of all of  
8       his tattoos. Browne heard the officers' presence announced  
9       as they approached the group on foot. Officer Browne  
10      detained the group, which included Petitioner and Robert  
11      Kundysek, an active member of Folks.

12             Petitioner was cooperative and discussed his tattoos.  
13      Browne spoke about Velasquez having been shot. Petitioner  
14      said he did not know what had happened yet because he had  
15      just been released from prison four days earlier.  
16      Petitioner admitted being a member of Folks and that his  
17      moniker was "Soldier." Browne asked why Petitioner was  
18      "posted up" and Petitioner said because it was his "hood."  
19      When asked if he was going to retaliate for Velasquez's  
20      shooting, Petitioner said, "We'll see. I just got out, and  
21      I need to find out what is going on." Browne advised  
22      Petitioner he was in violation of his parole by  
23      congregating with other gang members and Petitioner said  
24      they were just visiting him to pay him respect for having  
25      served his time in prison.

26             Browne contacted Petitioner in the neighborhood again  
27      the next evening. Petitioner was standing by himself in  
28      front of a fence bordering his apartment complex.

1       Petitioner's head was cleanly shaved and the tattoos on his  
2       head were exposed. Petitioner did not attempt to run. He  
3       said he still backed up Folks, but that he did not know  
4       whether he was going to participate in any gang-related  
5       activity. The police searched Petitioner on each occasion.  
6       He did not have any weapons or contraband on his person.

7               2.     November 22, 2008

8               Officer Richard Browning of the Anaheim Police  
9       Department patrols the Folks gang territory, which consists  
10      of large apartment complexes, duplexes and fourplexes. On  
11      November 22, he was on patrol in that area in a marked  
12      black and white patrol car. As he approached Mochican, he  
13      saw 10 to 15 people underneath a tree in front of an  
14      apartment on Neighbors, and about 10 to 15 yards away,  
15      three people standing underneath a street sign on the  
16      corner of Mohican and Neighbors. Browning identified the  
17      three as Petitioner, Kundysek, and Erik Lopez. As  
18      Browning's vehicle turned the corner, the three looked over  
19      their shoulders and ran westbound on Neighbors.

20              Browning drove into an alleyway in an attempt to  
21      intercept them. He turned off the patrol car's lights and  
22      got out, walking into a breezeway between two sets of  
23      apartments. He "peeked around the corner" and saw  
24      Petitioner go to the front lawn of one of the apartment  
25      buildings. Browning followed, attempting to close the  
26      distance between them. Hearing a voice, Browning stopped.  
27      He saw Kundysek looking up and down the street. Kundysek  
28      and Petitioner started to walk across the lawn. Browning

1 walked to within five feet of Petitioner and Kundysek  
2 without them noticing. When he turned the corner, he saw  
3 Petitioner, Kundysek, and Lopez together. He detained all  
4 three, ordered them to their knees, and called for backup.  
5 Petitioner had on gloves at the time he was arrested.

6 Officers Anderson and Staymates responded. Browning  
7 told Anderson to check the areas around the breezeway and  
8 in front of the apartments for a weapon or contraband.  
9 Staymates watched Petitioner, Kundysek, and Lopez while  
10 Anderson and Browning searched. Anderson found a gun about  
11 five to six inches from the top of a bush. The gun and  
12 bullets were inside a black beanie. Browning testified that  
13 the beanie was warm to the touch.

14 Browning pulled Lopez away from the other two to talk  
15 about the gun. Browning said they found a gun and wanted to  
16 know who it belonged to, because he knew it "belonged to  
17 one of the three of them." Lopez motioned with his head  
18 toward Petitioner and said Petitioner had the gun. Lopez  
19 said he could not talk in from of the others. Brown said  
20 they would talk at the police station.

### 21 3. Erik Lopez's Testimony

22 Lopez testified under a grant of immunity. He had  
23 lived in the Folks neighborhood for four or five months and  
24 was familiar with the Folks gang. On November 22, he was  
25 walking to the house of a girl he knew when he saw  
26 Petitioner standing on the corner of Neighbors and Mohican.  
27 Petitioner, who Lopez knew only as "Soldier," asked Lopez  
28 to "post up" with him. According to Lopez, "post up" means

1 to stand around doing nothing. Lopez said he had to go  
2 somewhere and asked Petitioner why he was not hanging out  
3 with the others. Petitioner said he did not want to shoot  
4 in front of children if someone came through the  
5 neighborhood.

6 Lopez went to visit the girl and was on his way home  
7 about an hour later, at around 9:30 p.m. Petitioner was  
8 standing on the same corner, talking to Kundysek. Lopez  
9 said Petitioner was wearing a beanie each time he saw him  
10 that day.

11 Petitioner and Kundysek asked Lopez to join them when  
12 Lopez stopped briefly to talk. He told them he had to get  
13 home for curfew and started to walk away. Lopez then saw  
14 Petitioner and Kundysek running. One of them said that "the  
15 cops are coming." Kundysek and Petitioner ran in between  
16 some duplexes and Lopez kept walking. Lopez said he saw  
17 Petitioner take off his beanie, take something from his  
18 waistband, put it inside the beanie, and throw the beanie  
19 inside the bush. Although Lopez did not see what Petitioner  
20 put into the beanie, he assumed it was a gun.

#### 21 4. DNA and Fingerprint Evidence

22 The gun was dusted for fingerprints but none were  
23 found. DNA samples were collected from the gun's grip,  
24 trigger and magazine release. Buccal swabs were taken from  
25 Petitioner, Kundysek and Lopez but they were excluded as  
26 contributors.

#### 27 5. The Gang Expert's Testimony

28 Browne testified that he has investigated several

1 crimes committed by Folks gang members. Folks stands for  
2 Family of Latin Kings. It is a traditional Hispanic street  
3 gang and has been in existence since at least the early  
4 1980's. It has approximately 60 documented members, about  
5 one-half of whom are active in the gang. Its major sign is  
6 FOLKS, but it also uses AFG, GF and Family of Latin Kings.  
7 The gang's primary activities include felony gun possession  
8 and felony vandalism. The prosecution introduced the  
9 convictions of various Folks gang members, including 2008  
10 convictions for felony assault and active participation in  
11 a criminal street gang, and 2007 convictions for  
12 concealment of a firearm in a vehicle by an active gang  
13 participant and active participation in a criminal street  
14 gang.

15 Browne testified that Petitioner was a member of the  
16 Folks criminal street gang on November 22, 2008. In  
17 reaching his conclusion, Browne investigated Petitioner's  
18 background and considered a number of factors. Petitioner  
19 had Folks tattoos. He received a Step notice in 2006. On at  
20 least 15 occasions, Petitioner was contacted by police  
21 while he was in the presence of other Folks gang members.  
22 Browne also considered Petitioner's 2007 statements that he  
23 is "a Folkster till I die" and that if anything happens in  
24 the neighborhood, he is probably going to know about and be  
25 involved in it.

26 Browne also testified to the meaning of Petitioner's  
27 tattoos. Petitioner has an "A" tattooed on the top of his  
28 head. The "A" signifies Anaheim, letting others know he is

1 from there and backs up the city. "AFG," which stands for  
2 Anaheim Folks Gang, is tattooed on the top of his head.  
3 "Anaheim" is tattooed across the back of his neck with  
4 "Folks" tattooed beneath it, indicating that he backs up  
5 the Folks gang. His moniker "Soldier" is tattooed on him as  
6 well. On his right hand is "Halo," another way of referring  
7 to Anaheim via the Angels baseball team. On his left hand  
8 is "City." He has tattoos on his fingers of the words  
9 "Vago" and "Malo," which are cliques of the Folks gang. One  
10 of his hands also bears the tattoo "167," which stands for  
11 AFG, the first, sixth and seventh letters of the alphabet.  
12 Another of his tattoos reads "R.I.P. Triste." Triste was a  
13 Folks gang member murdered in the neighborhood by a rival  
14 gang in 2002. On his left hand, Petitioner has three dots,  
15 a common tattoo among gang members, meaning "my crazy life,  
16 la vida loca." Petitioner obtained most of his tattoos  
17 between 2006 and 2008.

18 Tattoos are "extremely significant" in the gang  
19 culture because the member becomes a walking billboard for  
20 the gang. The existence of tattoos means members of other  
21 gangs do not have to "hit up" the person because the  
22 tattoos declare where he is from. Tattoos also indicate  
23 that the person protects or commits crime with his gang.  
24 Petitioner's tattoos are consistent with gang tattoos.

25 The prosecutor provided Browne with a set of facts in  
26 a hypothetical situation, which were similar to the facts  
27 of the charged offense, and asked Browne if he had an  
28 opinion as to whether the offense was for the benefit of,



1 at the direction of, or in association with, a criminal  
2 street gang. Browne opined the offense was for the benefit  
3 of Folks. According to Browne, "posting up" is standing in  
4 a location within the neighborhood where a gang member  
5 feels he will be seen by any rival gang members that come  
6 into the neighborhood. In essence, the individual posting  
7 up is protecting the neighborhood. Many times, the person  
8 posting up will have weapons hidden in close proximity,  
9 either in a bush, a trashcan, or on his person. Posting up  
10 with a loaded firearm benefits Folks by providing the gang  
11 with an advantage over any gang that should come through  
12 Folks' neighborhood. The reputation of a gang member who  
13 posts up with a firearm is benefitted. The fact that more  
14 than one gang member posted up supported a conclusion that  
15 the offense was committed in association with the criminal  
16 street gang.

17 (Lodgment 7 at 3-9.)  
18

## 19 **II. Standard of Review**

20 Under the Antiterrorism and Effective Death Penalty Act of 1996  
21 ("AEDPA"), federal habeas corpus relief is available to state  
22 prisoners who are in custody "in violation of the Constitution or  
23 laws or treaties of the United States." 28 U.S.C. § 2254(a). To  
24 establish a right to relief, a petitioner must show that the state's  
25 highest court rejected the petitioner's claim on the merits, and that  
26 this rejection was "contrary to, or involved an unreasonable  
27 application of, clearly established Federal law, as determined by the  
28 Supreme Court of the United States," or was "based on an unreasonable

determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d); *Harrington v. Richter*, --- U.S. ---, 131 S.Ct. 770, 783-84 (2011). These standards apply regardless of whether the state court explained its reasons for rejecting a prisoner's claim. *Richter*, 131 S.Ct. at 784 ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.").

It is not enough that a federal court conclude "in its independent judgment" that the state court decision is incorrect or erroneous. *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (per curiam)). "The state court's application of clearly established law must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003); see also *Renico v. Lett*, --- U.S. ---, 130 S.Ct. 1855, 1865 (2010). AEDPA imposes a "'highly deferential standard for evaluating state-court rulings; which demands that state-court decisions be given the benefit of the doubt." *Bell v. Cone*, 543 U.S. 447, 455 (2005) (quoting *Woodford*, 537 U.S. at 24); *Vasquez v. Kirkland*, 572 F.3d 1029, 1035 (9th Cir. 2009).

Habeas relief is unavailable if "fairminded jurists could disagree" about the correctness of the state court decision. *Richter*, 131 S.Ct. at 786 (quoting *Yarborough*, 541 U.S. at 664)(internal quotation marks omitted). For habeas relief to be granted, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S.Ct. at

1 786-87.

2 The claims raised in the instant petition were presented to the  
3 California Supreme Court, but that court did not issue a reasoned  
4 decision. (Lodgment 9.) Accordingly, this Court must "look through"  
5 the unexplained California Supreme Court decision to the last  
6 reasoned decision as the basis for the state supreme court judgment.  
7 *See Mendez v. Knowles*, 556 F.3d 757, 767 (9th Cir. 2009) (citing *Ylst*  
8 *v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)). The California Court of  
9 Appeal, in a reasoned opinion on the merits, rejected Petitioner's  
10 claims. (Lodgment 7.) Therefore, the reasoning of the California  
11 Court of Appeal will be considered to determine whether the  
12 California Supreme Court's decision is contrary to, or an  
13 unreasonable application of, clearly established federal law.

### 14 15 **III. Discussion**

#### 16 **A. The Evidence Was Sufficient to Support Petitioner's** 17 **Conviction for Felon in Possession of a Firearm**

18 Petitioner contends that the evidence produced at trial was  
19 insufficient to support his conviction for felon in possession of a  
20 firearm because he was never seen with the gun, it was not found on  
21 his person and there was no fingerprint or DNA evidence linking him  
22 to the gun. (Pet. at 5.) The finding by the California Court of  
23 Appeal that there was sufficient evidence to convict Petitioner of  
24 the crime of felon in possession of a firearm was neither contrary to  
25 nor an unreasonable application of federal law, nor an unreasonable  
26 determination of the facts in light of the evidence presented.

27 In his direct appeal, Petitioner argued that there was  
28 insufficient evidence to support his conviction for felon in

1 possession of a firearm because the prosecution failed to prove that  
2 he knew of or controlled the gun found in the beanie in the bush. The  
3 elements of the offense of felon in possession of a firearm are (1)  
4 conviction of a felony and (2) ownership, possession, custody or  
5 control of a firearm capable of being concealed on the person. Cal.  
6 Penal Code § 12021(a)(1). No specific criminal intent is required,  
7 and a general intent to commit the proscribed act is sufficient to  
8 sustain a conviction. *People v. Snyder*, 32 Cal.3d 590, 592 (1982).

9 The California Court of Appeal rejected Petitioner's claim,  
10 stating as follows:

11 Viewing the evidence in the light most favorable to the  
12 judgment, Petitioner, Kundysek, and Lopez were on a street  
13 corner in Folks gang territory when a police patrol car  
14 appeared. All three ran away. Officer Browning caught and  
15 detained them. Believing contraband or a weapon may have been  
16 tossed during the chase, a search of the area was conducted.  
17 A beanie containing a gun and bullets was found hidden in a  
18 bush where Browning, looking for the suspects, saw Petitioner  
19 reappear. The jury could reasonably infer the beanie had been  
20 placed in the bush recently because the beanie was still warm  
21 to the touch on this cool night. The fact that Petitioner wore  
22 gloves at the time would account for the lack of his DNA or  
23 fingerprints on the weapon. Moreover, Petitioner had been  
24 stopped and searched by police each of the two preceding days.  
25 He did not run on either occasion. The jury could reasonably  
26 infer Petitioner ran this time because he had a gun on his  
27 person and assumed he would again be searched.

28 These facts sufficiently corroborated Lopez's testimony

1       that he saw Petitioner remove something from his waistband,  
2       put it in the beanie and place the beanie in the bush. The  
3       evidence is substantial and supports the charge of felon in  
4       possession of a firearm.

5 (Lodgment 7 at 10-11.)

6       It is clearly established that the Due Process Clause of the  
7 Fourteenth Amendment requires that "no person shall be made to suffer  
8 the onus of a criminal conviction except upon sufficient proof -  
9 defined as evidence necessary to convince a trier of fact beyond a  
10 reasonable doubt of the existence of every element of the offense."  
11 *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (explaining *In re*  
12 *Winship*, 397 U.S. 358, 364 (1970)). To determine whether a criminal  
13 conviction satisfies this constitutional requirement, [a] state court  
14 must decide under *Jackson* "whether the evidence, viewed in the light  
15 most favorable to the prosecution, would allow any rational trier of  
16 fact to find the defendant guilty beyond a reasonable doubt." *Juan H.*  
17 *v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005) (citing *Jackson*, 443  
18 U.S. at 319).

19       In performing a *Jackson* analysis, "circumstantial evidence and  
20 inferences drawn from [the record] may be sufficient to sustain a  
21 conviction." *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995).  
22 A jury's credibility determinations are "entitled to near-total  
23 deference under *Jackson*." *Bruce v. Terhune*, 376 F.3d 950, 957 (9th  
24 Cir. 2004). The *Jackson* standard "must be applied with explicit  
25 reference to the substantive elements of the criminal offense as  
26 defined by state law." *Chein v. Shumsky*, 373 F.3d 978, 983 (9th Cir.  
27 2004) (en banc) (internal quotation marks omitted). On habeas review,  
28 a federal court must apply the *Jackson* standard "with an additional

1 layer of deference." *Juan H.*, 408 F.3d at 1274. The role of a federal  
2 habeas court under AEDPA is then to determine "whether a state court  
3 determination that evidence was sufficient to support a conviction  
4 was an 'objectively unreasonable' application of *Jackson*." *Id.* at  
5 1274-1275.

6 Viewed in the light most favorable to the judgment, a rational  
7 trier of fact could find beyond a reasonable doubt that Petitioner  
8 was guilty of being a felon in possession of a firearm. As explained  
9 by the court of appeal, Officer Browning testified that he found a  
10 beanie containing a gun hidden in a bush near where he had been  
11 chasing Petitioner. The beanie was warm to the touch and therefore  
12 had likely been recently placed in the bush. Erik Lopez testified  
13 that he saw Petitioner remove his beanie, take something from his  
14 waistband and put it in the beanie, and then place the beanie in the  
15 bush. Finally, based upon the testimony of Officer Browne that  
16 Petitioner had not run when he had been searched on two separate  
17 occasions and found not to have a weapon, the jury could reasonably  
18 infer that the reason that Petitioner ran that night was because he  
19 had a weapon on his person. This evidence was sufficient to allow a  
20 rational trier of fact to conclude beyond a reasonable doubt that  
21 Petitioner was guilty of being a felon in possession of a firearm.

22 The California Court of Appeal's decision was a reasonable  
23 application of *Jackson* to the facts of this case. Accordingly, habeas  
24 relief is not warranted on this claim.

25 **B. Petitioner Has Failed to Show That He Was Denied a Fair**  
26 **Trial on the Criminal Street Gang Participation Charge**

27 Petitioner contends that he was denied due process and a fair  
28 trial with respect to his conviction for active participation in a

1 criminal street gang based upon the following alleged errors: (1) the  
2 trial court denied his request for bifurcation of the gang  
3 allegations; (2) the gang expert improperly testified regarding  
4 matters that were excluded from trial; and (3) a witness lied under  
5 oath. (Pet. at 5.) Petitioner has failed to show that the decision of  
6 the California Court of Appeal rejecting this claim was either  
7 contrary to or an unreasonable application of federal law.<sup>2</sup>

### 8           **1. Bifurcation**

9           Prior to trial, Petitioner moved to bifurcate the trial on the  
10 gang related allegations from the trial on the underlying gun  
11 possession charge, arguing that the evidence introduced to support  
12 the gang allegations would be more prejudicial than probative. The  
13 trial court denied the motion, stating that it viewed the matter as  
14 a "gang-motivated case." The trial court also stated that it would be  
15 very difficult to try the matter without bringing to the jury's  
16 attention why Lopez was "hanging around" with Petitioner that day and  
17 why they were "posted up," guarding Velasquez's residence and the  
18 gang's turf. The trial court concluded that the probative value of  
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20           <sup>2</sup> Respondent contends that this claim is unexhausted because  
21 Petitioner failed to alert the California Supreme Court to the federal  
22 constitutional basis of the claim, and therefore the petition should be  
23 dismissed as a mixed petition. (Ans. at 13.) See *Rose v. Lundy*, 455  
24 U.S. 509, 522 (1982). However, when an unexhausted ground for relief  
25 does not raise a colorable federal claim, a federal court may deny  
26 relief on the merits. 28 U.S.C. § 2254(b)(2); *Cassett v. Stewart*, 406  
27 F.3d 614, 624 (9th Cir. 2005). The purpose of this rule, as explained  
28 by a House Report on the provision, is to "help avoid the waste of  
state and federal resources" that results when a "hopeless" claim for  
relief is sent back to state courts to exhaust state remedies. *Cassett*,  
406 F.3d at 624 (quoting H.R. Rep. 104-23, 1995 WL 56412, at \*9-10  
(Feb. 8, 1995)). Because Petitioner's claim is clearly meritless, the  
Court will address the substance of the claim rather than needlessly  
require Petitioner to first raise the same issue as a federal claim in  
state court.

1 the gang evidence to prove motive outweighed any prejudice from its  
2 introduction. (Lodgment 7 at 13.)

3 The California Court of Appeal rejected Petitioner's claim that  
4 the trial court abused its discretion in denying his motion to  
5 bifurcate the gang allegation from the underlying offense. The court  
6 of appeal found that the gang evidence was admissible to prove  
7 Petitioner's motive for committing the underlying weapons charge:  
8 "The evidence indicated Petitioner 'posted up' in a position where he  
9 would be visible to and could shoot any rival gang entering Folks  
10 territory, such as Citron Street, the gang that just two weeks  
11 earlier went into Folks' territory and shot Velasquez." (Lodgment 7  
12 at 13.)

13 The decision of the California Court of Appeal is neither  
14 contrary to, nor an unreasonable application of, clearly established  
15 Supreme Court precedent because no Supreme Court case has squarely  
16 addressed whether bifurcation of the trial of a gang sentencing  
17 enhancement from trial of the underlying offense is constitutionally  
18 mandated. See *Fuentes v. Hall*, 2009 WL 256558, at \*4 (C.D.Cal. 2009).  
19 Moreover, as noted *Spencer v. Texas*, 385 U.S. 554, 565-566 (1967),  
20 "[t]wo-part jury trials are rare in our jurisprudence; they have  
21 never been compelled by this Court as a matter of constitutional law,  
22 or even as a matter of federal procedure." In the absence of clearly  
23 established Supreme Court precedent, relief is not available.

24 Alternatively, it is well established that a joinder of charges  
25 or a failure to separate the guilt from the sentencing phase violates  
26 due process only if it results in prejudice so great as to deny a  
27 defendant his right to a fair trial. *United States v. Lane*, 474 U.S.  
28 438, 449 (1986). This principle has repeatedly been applied to gang



1 enhancement bifurcation claims such as that presented here. See,  
2 e.g., *Mendoza v. Sisto*, 2008 WL 2025144, \*9 (E.D. Cal. 2008); *Vang v.*  
3 *Runnels*, 2008 WL 324101, \*9 (E.D. Cal. 2008); *Gilbert v. Yates*, 2007  
4 WL 776284, \*5 (N.D. Cal. 2007). Moreover, the Ninth Circuit has held  
5 that a trial court's refusal to sever counts will justify habeas  
6 relief only when prejudice is so great that it "had a substantial and  
7 injurious effect or influence in determining the jury's verdict."  
8 *Sandoval v. Calderon*, 241 F.3d 765, 772 (9th Cir. 2000); see also  
9 *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). As stated in *Gilbert*  
10 at \*5, "the admission of evidence violates due process if there are  
11 no permissible inferences the jury may draw from the evidence. *Jammal*  
12 *v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991)."

13       Petitioner's claim fails because he cannot demonstrate prejudice  
14 arising from the trial court's refusal to bifurcate the trial of the  
15 gang allegations from the trial on the underlying gun possession  
16 offense. As noted by the court of appeal, the evidence of  
17 Petitioner's gang evidence was relevant to demonstrate his motive for  
18 carrying the gun.

19       In light of the admissibility of the gang evidence to establish  
20 motive, as well as the substantial weight of the evidence against  
21 Petitioner on the underlying weapons offense, Petitioner has failed  
22 to show that the trial court's refusal to bifurcate the gang  
23 enhancement had a "substantial and injurious effect" on the verdict  
24 and thereby deprived him of a fair trial. Therefore, the state  
25 court's rejection of Petitioner's claim was not contrary to nor an  
26 unreasonable application of clearly established federal law, and  
27 Petitioner is not entitled to habeas relief on this claim.

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## 2. Gang Expert Testimony

Based upon Officer Browne's preliminary examination testimony, Petitioner brought a pretrial motion to prevent Browne from using the term "gang gun theory" or referencing "Mexican Mafia, Sureños." The trial court ordered that the gang expert was not to testify about the Mexican Mafia. The court also held that the prosecutor could introduce evidence of a "gang gun," but that the expert could not opine that if a number of individuals were "posting up" together and a gun was present, each would know of the gun's presence.

On direct examination, the prosecutor asked Browne about police questioning of gang members for intelligence gathering purposes as opposed to crime investigation. Browne answered: "We gather - we are looking for a lot of things when we are talking to them. One, the way they are dressing, the trends that are going on with clothing, tattoos - tattoos that are becoming more and more prevalent to that specific gang with Orange County or to Sureños, which is..." Petitioner immediately objected and the reference to Sureños was stricken. (Lodgment 7 at 13-14.)

The California Court of Appeal rejected Petitioner's claim of error: "Here there was no reference to the Mexican Mafia because the mention of Sureños was stricken before the jury learned what the term meant. Under these circumstances, Petitioner was not prejudiced .... Moreover, the jury was instructed it could not consider stricken testimony and we presume it followed the instruction." (Lodgment 7 at 14.)

Petitioner cannot show that he was prejudiced by the gang expert's use of the word "Sureños." The gang expert only used the word on a single occasion, there was an immediate objection, and the

1 trial court struck the reference with an instruction directing the  
2 jury not to consider stricken testimony as evidence. The Supreme  
3 Court has held that a single question followed by an immediate  
4 objection and a curative instruction does not violate a defendant's  
5 due process rights. *Greer v. Miller*, 483 U.S. 756, 765-67 (1987).  
6 Accordingly, Petitioner is not entitled to relief on this claim of  
7 error.

### 8                   **3.     Witness Perjury**

9           Petitioner contends that a witness "admitted to lying under  
10 oath." (Pet. at 5.) Although Petitioner apparently did not raise this  
11 claim in the California state courts, the Court will nevertheless  
12 address this claim on the merits rather than require Petitioner to  
13 exhaust this claim in the state courts.

14           Petitioner fails to identify the witness by name or state  
15 specifically what the witness allegedly lied about. Petitioner also  
16 fails to provide any citation to the record to support his claim.  
17 Petitioner's conclusory allegations about alleged witness perjury are  
18 clearly insufficient to merit habeas relief. *See Jones v. Gomez*, 66  
19 F.3d 199, 204-05 (9th Cir. 1995) (vague speculation or mere  
20 conclusions unsupported by record not sufficient to state claim);  
21 *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory  
22 allegations which are not supported by a statement of specific facts  
23 do not warrant habeas relief."). Accordingly, this claim is without  
24 merit and Petitioner is not entitled to relief.

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1 **IV. Conclusion**

2 For the reasons stated above, the petition for writ of habeas  
3 corpus is **DENIED**.

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5 Dated: July 14, 2011



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7 Marc L. Goldman  
8 United States Magistrate Judge  
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